UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TAMMY and GLENN MENEAR, individually and in their own right, and as parents of JOSEPH MENEAR,	)	
Plaintiffs	)	***Civil No. 00-23-P-DMC***
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR DISMISSAL, IN PART, AND FOR SUMMARY JUDGMENT[1]

In this action in which the plaintiffs seek to recover for injuries emanating from the fall of a five-year-old child from a slide in a playground in a Brunswick Naval Air Station ("BNAS") housing area, the defendant seeks summary judgment as to the first three counts against it and moves to dismiss the fourth and final count for lack of subject matter jurisdiction. Defendant's Motion and Incorporated Memorandum for Dismissal, in Part, and for Summary Judgment ("Motion") (Docket No. 6) at 1-3; Complaint for Damages ("Complaint") (Docket No. 1) ¶¶ 4, 8-9. Inasmuch as the plaintiffs do not contest the defendant's entitlement to dismissal of Count IV, *see generally* Opposition to the Defendant United States of America's Motion for Summary Judgment and for Dismissal, in Part ("Opposition")

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

(Docket No. 10), and I find that the defendant is entitled to summary judgment on the merits as to Counts I-III, the Motion is granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

In setting forth the summary-judgment record in this case, I note at the outset that its contours are shaped in large part by the plaintiffs' substantial non-compliance with Local Rule 56. This rule requires a party opposing a motion for summary judgment to submit an opposing statement of facts that "shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule." Loc. R. 56(c). The opposing party may also submit "additional facts, set forth in separate numbered paragraphs and supported by a record citation as required by subsection (e) of this rule." *Id*. "An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion." Loc. R. 56(e).

The plaintiffs in this case submit no document directly responsive to the defendant's statement of material facts. The defendant's facts, to the extent properly supported by record citations, accordingly are deemed admitted. *See* Loc. R. 56(e) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted."); *see generally* Statement of Material Facts ("Defendant's SMF") (Docket No. 7).

In setting forth their own narrative-form statement of material facts, the plaintiffs also contravene Local Rule 56 by omitting to number paragraphs, frequently failing to support a statement with any citation to the record and, in instances in which supporting materials are referenced, sometimes neglecting to provide citations to specific portions therein. *See generally* Statement of Material Facts ("Plaintiffs' SMF") (Docket No. 9). To the extent that the defendant objects to these statements at least in part on the ground of non-compliance with Local Rule 56, I exclude them. *See*

generally Defendant's Objections in Response to Plaintiffs' Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 11); *see also* Loc. R. 56(e) ("The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment."); *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court=s summary judgment decision based on facts not properly presented therein.").[2]

Against this backdrop, the following comprise the facts germane to this decision:

At approximately 5 p.m. on May 14, 1996 five-year-old Joseph Menear fell from a playground slide in the Shobe Avenue recreation area (the "Shobe Avenue Playground"), located within a United States Navy housing area in Brunswick, Maine. Defendant's SMF ¶¶ 1, 3, 6. Joseph is the son of Glenn Menear, an aviation administration chief in the United States Navy, and Tammy Menear, residents of Navy-provided housing at 29 Shobe Avenue in Brunswick, part of the so-called McKeen Street housing area.[3] *Id*. ¶¶ 1,6. Following the fall Joseph was admitted to Mid Coast Hospital, where he was treated for a "buckle fracture" to his right arm. *Id*. ¶ 7.

The slide from which Joseph fell was approximately ten feet high, made of metal and believed to have been manufactured in the United States by American Standard. *Id*. ¶ 3. Subsequent to Joseph's fall, the slide was removed and destroyed as part of a planned replacement. *Id*.

As a general matter, military members with dependents living with them are entitled to Navy housing. *Id*. ¶ 1. Residents in military housing do not pay fees or rents. *Id*. At the BNAS housing areas, residents have the nonexclusive right to use the adjacent recreational areas, including the Shobe Avenue Playground. *Id*. ¶¶ 1, 3. Nonresidents are not precluded from using the same recreation areas.

[2] Excluded on this basis are all but paragraph 8 of the Plaintiffs' SMF. *See* Defendant's Reply SMF ¶¶ 1-7, 9-13.

[3] The McKeen Street housing area is not located within the BNAS itself. Defendant's SMF ¶ 2.

Id. ¶ 1. The Navy posts no gates or watches to preclude nonresidents access to any of the recreation areas adjacent to the McKeen Street housing area, which are open to both residents and the public. *Id.* ¶ 2.

In 1995 and 1996, playgrounds at Navy facilities were inspected yearly by specific Housing and/or Safety offices. *Id*. ¶ 4. A yearly inspection of all of the BNAS recreation areas was conducted by the area Housing Managers and/or the BNAS Safety Office. *Id*. Prior to May 1996, the Shobe Avenue Playground had last been inspected in spring 1995. *Id*. The U.S. Consumer Products Safety Commission's ("CPSC's") Handbook for Playground Public Safety was used as a guide to assist in determining the safety of the equipment. *Id*. All of the playground equipment was found safe at the spring 1995 inspection. *Id*.[4]

The BNAS Housing Office keeps reports of accidents or complaints involving BNAS recreational areas. *Id*. ¶ 8. Once a complaint is made to this office, the area managers investigate it. *Id*. If no action is needed, nothing is annotated to document the complaint. *Id*. If action is required, it is documented and files are maintained for a minimum of three years. *Id*. There were no complaints of unsafe conditions regarding the slide in the Shobe Avenue Playground prior to Joseph's fall. *Id*. McKeen Street military residents James and Cheryl Lowande, the parents of a child who earlier fell on that slide, did not file a complaint or a report of the accident with BNAS, and the BNAS Housing Office was unaware of that accident before Joseph's fall. *Id*.

The plaintiffs allege that the defendant did not comply with its "own orders" and failed to maintain safe playground equipment pursuant to CPSC guidelines. *Id*. ¶ 9. OPNAVINST 1700.9D, a direction from the Chief of Naval Operations with which all Naval commands are required to comply,

[4] The plaintiffs assert that none of the surfacing materials recommended by the CPSC existed on the Shobe Avenue Playground in May 1996. *See* Plaintiffs' SMF ¶ [8]. Even though the defendant does not properly controvert this critical factual assertion, *see* Defendant's Reply SMF ¶ 8, per Loc. R. 56(e) it cannot be deemed admitted given the plaintiffs' complete failure to support it with (continued…)

required the design, construction and installation of playground equipment to conform by October 1, 1995 to the CPSC playground safety standards for the specific ages of children using it. *Id*. However, that instruction governed playground equipment standards for Navy day-care centers, not housing playground equipment. *Id*.

III. Analysis

The plaintiffs' claims arise under the Federal Tort Claims Act ("FTCA"), *see* Complaint ¶ 1, pursuant to which the United States is liable, with exceptions not here relevant, for its tortious conduct "in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. § 2674; *see also Rodriguez v. United States*, 54 F.3d 41, 44 (1st Cir. 1995). There is no dispute that Maine law governs this case. Motion at 5; Opposition at 2. The defendant seeks to avoid liability primarily on the basis of the Maine recreational-use statute ("RUS"), 14 M.R.S.A. § 159-A, Motion at 3[5]; the plaintiffs rejoin that the RUS is inapplicable on several grounds, Opposition at 3-14.

The RUS provides in relevant part:

> **1. Definitions.** As used in this section, unless the context indicates otherwise, the following terms have the following meanings.
>
> **A.** "Premises" means improved and unimproved lands, private ways, roads, any buildings or structures on those lands and waters standing on, flowing through or adjacent to those lands.
>
> **B.** "Recreational or harvesting activities" means recreational activities conducted out-of-doors, including, but not limited to, hunting, fishing, trapping, camping, environmental education and research, hiking, sight-seeing, operating snow-traveling and all-terrain vehicles, skiing, hang-gliding, dog sledding, equine activities, boating, sailing, canoeing, rafting, biking, picnicking, swimming or

any citation to the record, *see* Plaintiffs' SMF ¶ [8].

[5] The defendant originally did not seek summary judgment based on application of the RUS with respect to Count II, which it construed as a claim for intentional infliction of emotional distress. *See* Motion at 15-17. The plaintiffs subsequently clarified that Count II alleges claims for negligent infliction of emotional distress and loss of consortium. *See* Opposition at 14. The defendant now argues that the RUS preempts all of the plaintiffs' claims. *See* Reply at 2.

activities involving the harvesting or gathering of forest, field or marine products. It includes entry of, volunteer maintenance and improvement of, use of and passage over premises in order to pursue these activities. "Recreactional or harvesting activities" does not include commercial agricultural or timber harvesting.

2. Limited duty. An owner, lessee, manager, holder of an easement or occupant of premises does not have a duty of care to keep the premises safe for entry or use by others for recreational or harvesting activities or to give warning of any hazardous condition, use, structure or activity on these premises to persons entering for those purposes. This subsection applies regardless of whether the owner, lessee, manager, holder of an easement or occupant has given permission to another to pursue recreational or harvesting activities on the premises.

3. Permissive use. An owner, lessee, manager, holder of an easement or occupant who gives permission to another to pursue recreational or harvesting activities on the premises does not thereby:

A. Extend any assurance that the premises are safe for those purposes;

B. Make the person to whom permission is granted an invitee or licensee to whom a duty of care is owed; or

C. Assume responsibility or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

4. Limitations on section. This section does not limit the liability that would otherwise exist:

A. For a willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity;

B. For an injury suffered in any case where permission to pursue any recreational or harvesting activities was granted for a consideration other than the consideration, if any, paid to the following:

(1) The landowner or the landowner's agent by the State; or

(2) The landowner or the landowner's agent for use of the premises on which the injury was suffered, as long as the premises are not used primarily for commercial recreational purposes and as long as the user has not been granted the exclusive right to make use of the premises for recreational activities; or

C. For an injury caused, by acts of persons to whom permission to pursue any recreational or harvesting activities was granted, to other persons to whom the person granting permission, or the owner, lessee, manager, holder of an easement

> or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.
>
> **5. No duty created.** Nothing in this section creates a duty of care or ground of liability for injury to a person or property.

14 M.R.S.A. § 159-A.

The plaintiffs first assert that the RUS does not apply to urban playgrounds. Opposition at 7. This is so in their view because the purpose of this and similar statutes (including the model recreational-use statute drafted by the Council of State Governments in 1965) was to encourage owners of large tracts of rural, semi-rural and undeveloped lands that are difficult to supervise to open them to the public not to shield owners of improved recreational facilities who fail to maintain or safeguard them properly. *Id*. at 6-9.

Whatever the intrinsic public-policy appeal of this argument, it fails for the simple reason that the Maine RUS expressly applies not only to "recreational activities conducted out-of-doors" but also to "improved" lands and structures thereon. Recreational-use statutes in the cases on which the plaintiffs rely do not expressly contemplate their application to "improved" land. *See Walsh v. City of Philadelphia*, 585 A.2d 445, 448, 450 (Pa. 1991) (holding statute, which applied to "land, roads, water, watercourses, private ways and buildings, structures and machinery or equipment when attached to the realty," inapplicable to completely improved recreational center); *Cassio v. Creighton Univ.*, 446 N.W.2d 704, 708, 711 (Neb. 1989) (holding statute, which applied to "land and water areas," inapplicable to indoor recreational facilities, including indoor swimming pools); *Wymer v. Holmes*, 412 N.W.2d 213, 217, 220 (Mich. 1987) (holding, in case in which statute provided no cause of action for injuries "to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use," that statute was "intended to

apply to large tracts of undeveloped land suitable for outdoor recreational uses"); *Wadsworth v. Town of Berwick*, 484 So.2d 762, 763 n.1, 764 (La. Ct. App. 1986) (holding, in case in which statute applied to "land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty," that playground slide fell outside contemplation of statute because of a type usually found in someone's backyard rather than normally encountered in "true outdoors"); *Kucher v. County of Pierce*, 600 P.2d 683, 685 n.2, 688 (Wash. Ct. App. 1979), *superseded by statute as noted in Bernstein v. State*, 767 P.2d 958 (Wash. Ct. App. 1989) (holding, in case in which statute applied to "agricultural or forest lands or water areas or channels and rural lands adjacent to such areas or channels," that improved, routinely inspected park inside city limits did not qualify as "forest"); *Primo v. City of Bridgeton*, 392 A.2d 1252, 1255, 1257 (N.J. Super. Ct. Law Div. 1978), *superseded by statute as noted in Weber v. United States*, 991 F. Supp. 694 (D.N.J. 1998) (holding, in case in which statute applied to "premises," that immunity did not attach when person injured on slide in park, which represented both an improvement and an artificial condition).[6]

The plaintiffs also suggest that the RUS is inapplicable in this case because the Shobe Avenue Playground was used by military personnel and their families, not the general public. Opposition at 9, 13. Even assuming *arguendo* that a premises must be open to the public to qualify for immunity

[6] Courts in other cases have held recreational-use statutes applicable to playground equipment. *See, e.g., Hegg v. United States*, 817 F.2d 1328, 1330 (8th Cir. 1987) (affirming District Court judgment that Iowa recreational-use statute applicable in case involving swing-set accident); *Molinaro v. Town of Northbridge*, 643 N.E.2d 1043, 1044 (Mass. 1995) (noting that Massachusetts recreational-use statute contained "no statutory exemption for playground injuries to children"); *Kopplin v. City of Garland*, 869 S.W.2d 433, 441 (Tex. Ct. App. 1993) ("playing on playground equipment on the City's playground is a recreational activity contemplated under" Texas recreational use statute). Although, inasmuch as appears, the Law Court has not been called upon to decide whether a landowner could be immune for injuries sustained on an urban playground, it has stated that it construes the immunity provision of the RUS broadly. *See Hafford v. Great N. Nekoosa Corp.*, 687 A.2d 967, 969 (Me. 1996); *see also Schneider v. United States*, 760 F.2d 366, 368 (1st Cir. 1985) (list of recreational activities covered by Maine RUS "is only illustrative. . . . Neither as a matter of grammatical construction, nor sense, is the statute to be read as applying only to the recreational activities expressly named.").

pursuant to the RUS, the record reveals that the Shobe Avenue Playground was in fact open to the public. That military personnel and their dependents may have been its primary users is irrelevant.

The plaintiffs next imply that application of RUS immunity to a governmental entity is inappropriate, citing *Hovland v. City of Grand Forks*, 563 N.W.2d 384 (N.D. 1997). Opposition at 11-13. *Hovland*, in which the court held that political subdivisions fall outside the ambit of protection of the North Dakota recreational-use statute, *see Hovland*, 563 N.W.2d at 387-88, is inapposite. By virtue of the FTCA, the United States is expressly made liable to the same extent as a private party. 28 U.S.C. § 2674; *see also, e.g., DiMella v. Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) (rejecting argument that Massachusetts recreational-use statute's asserted inapplicability to state governmental instrumentalities rendered it inapplicable to United States in FTCA claim).

The plaintiffs finally seek to fit their case within two exceptions to application of the RUS codified within the statute: (i) payment of consideration by a user and (ii) willful or malicious failure to warn or guard against a danger by a landowner. Opposition at 8-11. Turning to the first of these exceptions, the plaintiffs assert that "although no fee was charged directly, certainly the playground and other facilities which went with Navy housing, was a benefit provided to the Navy members and their families and children." *Id*. at 8. This attenuated exchange is not the kind of transaction contemplated by the RUS *i.e.*, the payment of consideration to a landowner for the grant of permission to pursue a recreational activity. *See, e.g., Robbins v. Great N. Paper Co*., 557 A.2d 614, 617 (Me. 1989) (for purposes of RUS, "[c]onsideration should not be deemed given . . . unless it is a charge necessary to utilize the overall benefits of a recreational area so that it may be regarded as an entrance or admittance fee.") (citations and internal quotation marks omitted); *see also Mansion v. United States*, 945 F.2d 1115, 1118-19 (9th Cir. 1991) (rejecting argument that picnic at Naval Air

Station conferred benefit of improved labor relations on United States, thus constituting "consideration" for purposes of California recreational-use statute).

Nor could a reasonable trier of fact on this record discern a willful or malicious failure to warn of or guard against danger. Upon inspection in spring 1995 the equipment in the Shobe Avenue Playground was determined to be safe. Although a child was injured in a fall from the slide prior to the incident in question, the earlier fall was not reported to Navy housing authorities. The existence of an unsafe condition, together with knowledge that people use an area for recreational purposes, do not standing alone establish willfulness or maliciousness for purposes of the RUS. *See, e.g., Jordan v. H.C. Haynes, Inc.*, 504 A.2d 618, 619 (Me. 1986) (holding, in case in which defendant had altered grade crossing by removing railroad ties, "Haynes's knowledge that the road was used by others is not adequate, without more, to raise the issue of whether defendants willfully or maliciously failed to maintain the premises in a safe condition or failed to warn against dangerous conditions thereon" for purposes of the RUS); *see also, e.g., Hegg*, 817 F.2d at 1332 ("It is critical in this case that Hegg failed to produce any evidence that defendant was aware of any dangerous condition in the swing set or of any previous injuries to users.")[7]

IV. Conclusion

For the foregoing reasons, the Motion is **GRANTED**.

Dated at Portland, Maine, this 27th day of October, 2000.

[7] The plaintiffs favor a formulation of willfulness followed by the Court of Appeals for the Ninth Circuit in construing the California recreational-use statute: that willful misconduct is proven upon a showing of "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." *See* Opposition at 10-11; *see also Termini v. United States*, 963 F.2d 1264, 1267 (9th Cir. 1992) (citations and internal quotation marks omitted). There is no indication that this formulation has been adopted in Maine; however, even if it were, the summary-judgment record does not reveal a conscious failure to act to avoid peril. Rather it reveals a judgment (however mistaken) that the equipment at the Shobe Avenue playground was safe, and a lack of knowledge as of the time of Joseph Menear's accident that there had been any prior injuries on the slide.

David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-23

MENEAR, et al v. USA — Filed: 01/14/00
Assigned to: MAG. JUDGE DAVID M. COHEN
Demand: $0,000 — Nature of Suit: 360
Lead Docket: None — Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 28:1346 Tort Claim

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v.	
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